No. 16074

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAM TITLE, aka Sam Teitelman,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Jurisdiction.

In an action instituted by appellee [R. 2-10][1] the court below on July 12, 1955, entered judgment revoking the order admitting appellant to citizenship and cancelling his certificate of naturalization [R. 30-31]. The District Court had jurisdiction to entertain appellee's action and to enter the aforementioned judgment pursuant to Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A. Sec. 1451(a).[2]

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[1]"R" indicates references to the typed Transcript of Record. "Br" indicates references to Appellant's Opening Brief.

[2]The second Cause of Action alleged jurisdiction under the provisions of Section 338(a) of the Nationality Act of 1940 as continued in force and effect by Section 405(a) of the Immigration and Nationality Act; and the District Court also assumed jurisdiction on this basis. However, since for the purposes of the instant appeal the two statutes are the same (*United States v. Zucca,* 351 U. S. 91, 94 (1956)), the present brief will only discuss Section 340(a) of the Immigration and Nationality Act.

On May 22, 1958 appellant moved the court below to set aside and vacate the denaturalization judgment entered on July 12, 1955 on the ground that the judgment was void in that the required affidavit of a showing of good cause was never filed and that it was no longer equitable that the judgment should have prospective application [R. 36]. On May 26, 1958 appellant also moved the District Court to dismiss appellee's complaint on the ground that the Court had no jurisdiction over the subject matter [R. 38]. The court below had jurisdiction to entertain appellant's motion to set aside and vacate the denaturalization judgment pursuant to Rule 60(b)(4) and (5), Federal Rules of Civil Procedure. Appellee knows of no jurisdictional basis for appellant's motion to dismiss complaint, and appellant cites none in his Opening Brief.

Since the order of the District Court denying appellant's motion [R. 43] was a final decision, this Court has jurisdiction of an appeal from that decision pursuant to Title 28, United States Code, Section 1291.

Statement of the Case.

On October 21, 1954, appellee filed a complaint in the court below seeking to revoke and set aside the order admitting appellant to citizenship and to cancel his certificate of naturalization [R. 2-10]. No affidavit showing good cause was filed with the complaint or thereafter made a part of the record. Appellant attacked the Court's jurisdiction because of the absence of the affidavit in a motion to dismiss the complaint [R. 12, 14] and in his answer [R. 27]. The District Court ruled against appellant on this jurisdictional issue [R. 23] and on July 12, 1955 entered judgment against appellant, revoking the order ad-

mitting him to citizenship and cancelling his certificate of naturalization [R. 30-31].[3]

On September 8, 1955 appellant filed a Notice of Appeal from the denaturalization judgment [R. 32]; however, on February 27, 1956 this Court issued its mandate ordering the appeal dismissed "for failure of appellant to prosecute the appeal" [R. 33-34]. This Court's mandate was filed and spread upon the records of the District Court on February 29, 1956 [R. 35].

On April 30, 1956 the Supreme Court decided *United States v. Zucca,* 351 U. S. 91, and on April 7, 1958 the Supreme Court decided the *Matles, Lucchese,* and *Costello* cases[4] holding that the affidavit "must be filed with the complaint when the proceedings are instituted" (356 U. S. at p. 257).

On May 22, 1958 appellant moved the court below to set aside and vacate the denaturalization judgment entered on July 12, 1955 on the ground that the judgment was void in that the required affidavit showing good cause was never filed and that it was no longer equitable that the judgment should have prospective application [R. 36]. On May 26, 1958 appellant also moved the District Court to dismiss appellee's complaint on the ground that the Court had no jurisdiction over the subject matter [R. 38]. On June 19, 1958 the court below entered an order denying appellant's motions [R. 43]. The instant appeal is taken from that order [R. 44].

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[3]The opinion of the District Court is reported: *United States v. Title,* 132 Fed. Supp. 185 (S. D. Calif., 1955).

[4]*Matles v. United States,* No. 378; *Lucchese v. United States,* No. 450, and *Costello v. United States,* No. 494, all reported at 356 U. S. 256.

Issues Presented.

1. Is the denaturalization judgment void?

2. Did the District Court err in denying appellant relief under Rule 60(b)(5), Federal Rules of Civil Procedure.

Statutes and Rules.

Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A., Sec. 1451(a), provides in pertinent part:

> "Sec. 340(a). It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *"

Rule 60(b), Federal Rules of Civil Procedure, provides in part:

> "(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may re-

lieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C. §1655, or to set aside a judgment for fraud upon the court. * * *"

ARGUMENT.

I.

The Denaturalization Judgment Is Not Void.

A. The Affidavit Requirement Is Not Jurisdictional.

The Supreme Court did not hold that the affidavit requirement of Section 340(a) of the Immigration and Nationality Act is jurisdictional. *United States v. Zucca,* 351 U. S. 91 (1956), merely holds that the affidavit is "a procedural prerequisite to the maintenance of proceedings" (351 U. S. at p. 99); but nowhere suggests that it is a jurisdictional prerequisite.

The Supreme Court's *per curiam* order in the *Matles, Lucchese,* and *Costello* cases[5] merely clarified the *Zucca* opinion by ruling that the affidavit "must be filed with the complaint when the proceedings are instituted" (356 U. S. at p. 257). The Supreme Court has consistently and studiously avoided characterizing the affidavit requirement as jurisdictional.

Appellant in his Opening Brief (Br. 3-4) relies upon the word "prerequisite" employed by the Chief Justice in *Zucca,* to show that the affidavit requirement is jurisdictional. The terms "jurisdiction" and "jurisdictional," however, are well established concepts in our jurisprudence. Had the Supreme Court deemed the affidavit requirement jurisdictional, it would have so stated in the language customarily employed to express these concepts.

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[5]*Matles v. United States,* No. 378; *Lucchese v. United States,* No. 450, and *Costello v. United States,* No. 494, all reported at 356 U. S. 256.

B. The Determination by the District Court That It Had Jurisdiction Is Res Judicata.

Even if the affidavit requirement be regarded as jurisdictional in the sense that suit could not be maintained without it, the ruling of the District Court that it had jurisdiction is not of the sort to render its judgment void, and thus subject to attack under Rule 60(b)(4), Federal Rules of Civil Procedure.[6] Aside from such fundamental jurisdictional elements such as service of process, a Court's determination that it has jurisdiction is *res judicata* and subject to review only on appeal.

United States v. Williams, 341 U. S. 58 (1951);

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940);

Stoll v. Gottlieb, 305 U. S. 165 (1938);

American Surety Co. v. Baldwin, 287 U. S. 156 (1932);

Baldwin v. Traveling Men's Assn., 283 U. S. 522 (1931);

Elgin Natl. Watch Co. v. Barrett, 213 F. 2d 776, 779 (5th Cir., 1954);

Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316 (8th Cir., 1894);

7 Moore's Federal Practice, Sec. 60.25, pp. 264-271.

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[6]In 7 Moore's Federal Practice, Section 60.25, the author concludes (p. 272):

"Clause (4) does not, however, have wide applicability, because *under principles that are applicable in determining whether a judgment is valid or whether it is void, most federal district court judgments, even though they be erroneous, are not void.*" (Emphasis added.)

As the Supreme Court pointed out in *Stoll v. Gottlieb, supra,* at page 171:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. *There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court.*" (Emphasis added.)

Section 340(a) of the Immigration and Nationality Act expressly conferred power upon the court below to revoke and set aside the order admitting appellant to citizenship and to cancel his certificate of naturalization; so that its action in entertaining appellee's suit without the required affidavit constituted a mere error in the exercise of jurisdiction as distinguished from a usurpation of power.

Appellant raised the issue of jurisdiction in the denaturalization proceeding [R. 12, 14, 27] and it was decided adversely to him [R. 23]. He took an appeal to this Court [R. 32], but thereafter abandoned it [R. 33-34; see *Sunal v. Large,* 332 U. S. 174 (1947)]. The principle underlying the doctrine of *res judicata* was enunciated in *Baldwin v. Traveling Men's Assn.,* 283 U. S. 522 (1931), where the Supreme Court declared (pp. 525-526):

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

The issue here involved was recently decided by Judge Wortendyke of the District of New Jersey in the case of *United States v. Bartolo Failla,* Civ. Action File No. 668-53 (July 18, 1958—opinion not yet reported).[7] There the denaturalization judgment was entered on December 5, 1957, after the *Zucca* decision but before the Supreme Court's *per curiam* order of April 7, 1958 in the *Matles, Lucchese,* and *Costello* cases. On June 16, 1958 Failla moved to vacate and set aside the denaturalization judgment "because an affidavit showing good cause was not filed with the complaint,"[8] invoking subdivisions (4) and (6) of Rule 60(b), Federal Rules of Civil Procedure. Judge Wortendyke in an exhaustive opinion denied the motion, holding that the denaturalization judgment was not void and that Failla had failed to show any basis warranting relief under Rule 60(b).

II.

The District Court Did Not Err in Denying Appellant Relief Under Rule 60(b)(5), Federal Rules of Civil Procedure.

In his Opening Brief appellant relies upon Rule 60(b)-(5), Federal Rules of Civil Procedure, which provides that on motion "and upon such terms as are just, the court may relieve a party" from a final judgment for the reason, *inter alia,* that "it is no longer equitable that the judgment should have prospective application." Appellant made no showing before the District Court, nor does

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[7]This is the only decision appellee has been able to find involving the precise issue here involved.

[8]The *Failla* decision differs from the present case in that the affidavit was filed later during the denaturalization proceedings. Appellee does not believe this difference material.

he in his Opening Brief, to support his allegation that it is no longer equitable that the denaturalization judgment against him should have prospective application. Apparently he relies solely upon the decisions of the Supreme Court in the *Zucca, Matles, Lucchese,* and *Costello* cases, *supra.*

It is well settled, however, that Rule 60(b) was not intended to provide relief for error on the part of the court or to afford a substitute for appeal. *Ackermann v. United States,* 340 U. S. 193 (1950); *Morse-Starrett Products Co. v. Steccone,* 205 F. 2d 244, 248-249 (9th Cir., 1953); *Berryhill v. United States,* 199 F. 2d 217 (6th Cir., 1952); *United States v. Bartolo Failla,* Civil Action File No. 668-53 (D. C. N. J., July 18, 1958—Opinion not yet reported); *Loucke v. United States,* 21 F. R. D. 305 (S. D. N. Y., 1957). Nor is a change in the judicial view of applicable law after a final judgment sufficient basis for vacating such judgment entered before announcement of the change.[9] (*Collins v. City of Witchita, Kansas,* 254 F. 2d 837 (10th Cir., 1958); *Berryhill v. United States, supra; United States v. Bartolo Failla, supra; Loucke v. United States, supra.)*

In *Ackermann v. United States, supra,* the Supreme Court considered a motion to set aside a denaturalization judgment. Although in that case petitioner urged the applicability of subdivision (6) of Rule 60(b) rather than subdivision (5) as is here contended, the case is persuasive as to the showing which the Supreme Court will re-

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[9]At the time the denaturalization judgment was entered on July 12, 1955, the controlling precedent in this Circuit was *Schwinn v. United States,* 112 F. 2d 74, 75-76 (C. C. A. 9, 1940), affirmed 311 U. S. 616, which held that the affidavit requirement was not jurisdictional.

quire to set aside denaturalization judgments. The Supreme Court limited the applicability of Rule 60(b)(6) to "extraordinary circumstances" (340 U. S. at p. 199), as exemplified in *Klapprott v. United States,* 335 U. S. 601 (1949). Ackermann had alleged that he did not appeal the denaturalization judgment against him because his attorney advised him that he would have to sell his home to pay costs; and that a federal officer, in whose custody he and his wife then were and in whom he had confidence, had told him "to hang on to their home" and he would be released at the end of the war. With respect to these allegations, Justice Minton, speaking for the majority, declared (p. 198):

> "* * * Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. *Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong,* considering the outcome of the Keilbar case.[10] There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

In the case at bar appellant took an appeal, but allowed his appeal to be dismissed for want of prosecution. Appellant made no showing before the District Court as to the reason he failed to prosecute his appeal. Paraphrasing the language of the Supreme Court quoted above, appel-

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[10]Keilbar was a relative of Ackermann against whom a denaturalization judgment had been entered in a consolidated trial with the Ackermanns. Upon appeal the judgment against Keilbar was reversed upon stipulation.

lant should not be relieved of his choice not to appeal because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the *Zucca, Matles, Lucchese,* and *Costello* decisions.

Moreover, a motion to vacate under Rule 60(b), Federal Rules of Civil Procedure, is addressed to the sound legal discretion of the District Court, and will not be disturbed on appeal except for abuse of discretion. *(Atchison, Topeka and Santa Fe Railway Co. v. Barrett,* 246 F. 2d 846, 849 (9th Cir., 1957); *Parker v. Checker Taxi Company,* 238 F. 2d 241, 243-244 (7th Cir., 1956), cert. den. *sub. nom.; Field Enterprises, Inc. v. Parker, et al.,* 353 U. S. 922; *Stafford v. Russel,* 220 F. 2d 853 (9th Cir., 1955); *Jones v. Jones,* 217 F. 2d 239, 241 (7th Cir., 1954); *Perrin v. Aluminum Co. of America,* 197 F. 2d 254, 255 (9th Cir., 1952); *Independence Lead Mines Co. v. Kingsbury,* 175 F. 2d 983, 988 (9th Cir., 1949).) The circumstances of the case at bar render the language of this Court in *Perrin v. Aluminum Co. of America, supra,* particularly applicable (p. 255):

> "We are not prepared to say that the court abused its discretion in any particular. On the contrary we think its discretion was rightly exercised. Rule 60(b) was not intended to be resorted to as an alternative to review by appeal, *nor as a means of enlarging by indirection the time for appeal* except in compelling circumstances where justice requires that course. Cf. Hill v. Hawes, 320 U. S. 520, 64 S. Ct. 334, 88 L. Ed. 283. *Appellants had opportunity to obtain appellate review of the very rulings of which they now complain* but failed to take advantage of the opportunity within the time prescribed by Rule 73(a). *Having in consequence of their own lack of diligence*

been turned away at the front door they now seek at the rear. Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal. * * *" (Emphasis added.)

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the order of the District Court [R. 43] should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,

Attorneys for Appellee.